Kamala Loshanee a/p Ambalavanar v Jaffnese Co-operative Society

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–119 OF 1995
NIK HASHIM J
11 DECEMBER 1998

Civil Procedure *— Pleadings — Matters to be pleaded — Allegation of victimization — Whether could be covered by a general allegation of unfair labour practice*

Labour Law *— Termination of service — Dismissal — Whether past misconduct is relevant consideration — Whether doctrine of condonation was available*

Labour Law *— Termination of service — Justification — Cumulative effect of a repetition of similar acts of misconduct — Whether justify dismissal*

The applicant was found guilty of insubordination towards her superior and was dismissed from the service of the respondent. The dismissal was upheld by the Industrial Court. The Industrial Court took into consideration the past misconduct of the applicant, in which the last occured about 12 years prior to the present misconduct. The Industrial Court, however, disregarded the applicant's allegation of victimization. The applicant applied for orders of certiorari and mandamus in respect of the Industrial Court's award. The issues that arose were whether: (i) the past misconduct of the applicant was relevant in determining the appropriate punishment for subsequent misconduct; (ii) the cumulative effect of a repetition of similar acts of misconduct may justify dismissal; and (iii) allegation of victimization could be covered by pleading a general allegation of unfair labour practice.

Held, dismissing the application:

(1) Past misconduct is a relevant factor to be taken into consideration. In the instant case, since the final warning given some 12 years ago was breached by the applicant, the respondent could not be expected to overlook the past bad record and to confine itself to the particular present misconduct (see pp 65D, 66A–B); *Mui Beach Hotel v National Union of Hotel Bar and Workers* [1982] MLLR 125 followed.

(2) If there is a repetition of similar acts of misconduct, the cumulative effect may justify dismissal (see p 65D–E); *Syarikat Kenderaan Melayu Kelantan Bhd v Rosdi bin Zakaria* Industrial Court Award No 542 of 1995 followed. As the respondent was taking a cumulative view of the applicant's prior misconducts in deciding to dismiss her, the doctrine of condonation was not available (see p 66B); *Len Omnibus Co Ltd v Transport Workers Union* [1991] 1 ILR 484 followed.

(3) An allegation of victimization is distinct and specific in nature and it could not be covered by a general allegation of unfair labour

practice. It is a very serious and important averment which needed to be pleaded specifically. The Industrial Court was right in disregarding the issue as it was not specifically pleaded (see p 66F–G).

Obiter:

The proceedings before the High Court in the instant case, was not an appeal from a decision of the Industrial Court but a review in the manner in which the decision was made. The High Court was not entitled to consider whether the decision itself, on the merit of the facts, was fair and reasonable. It is not the function of the High Court in the exercise of its supervisory jurisdiction to hear a dispute de novo (see p 66G–I).

[Bahasa Malaysia summary

Pemohon telah didapati bersalah atas keingkaran terhadap pegawai yang lebih tinggi dan telah dipecat daripada perkhidmatan responden. Pemecatan tersebut telah disahkan oleh Mahkamah Perusahaan. Mahkamah Perusahaan mengambil kira salahlaku pemohon, yang mana yang terakhir berlaku lebih kurang 12 tahun sebelum salahlaku ini. Akan tetapi, Mahkamah Perusahaan telah tidak mengambil kira pengataan pemohon berkenaan dengan pemangsaan. Pemohon memohon untuk perintah certiorari dan mandamus berkenaan dengan award Mahkamah Perusahaan. Isu-isu yang timbul adalah sama ada: (i) salahlaku pemohon yang lepas adalah relevan dalam menentukan hukuman yang sesuai untuk salahlaku yang selanjutnya; (ii) kesan kumulatif perbuatan-perbuatan salahlaku sama yang berulangan boleh menjustifikasikan pemecatan; dan (iii) pengataan pemangsaan boleh dimasukkan dengan memplidkan satu pengataan amalan buruh yang tidak adil yang am.

Diputuskan, menolak permohonan:

(1) Salahlaku yang lepas adalah satu faktor yang relevan untuk diambilkira. Dalam kes ini, oleh kerana amaran akhir yang diberikan lebih kurang 12 tahun yang lepas telah dilanggar oleh pemohon, responden tidak boleh dikehendakki melepaskan perhatian terhadap rekod-rekod buruk yang lepas dan membataskan dirinya kepada salahlaku semasa yang tersebut (lihat ms 65D, 66A–B); *Mui Beach Hotel v National Union of Hotel Bar and Workers* [1982] MLLR 125 diikut.

(2) Jika terdapat satu pengulangan perbuatan-perbuatan salahlaku yang sama, kesan kumulatifnya boleh menjustifikasikan satu pemecatan (lihat ms 65D–E); *Syarikat Kenderaan Melayu Kelantan Bhd v Rosdi bin Zakaria* Industrial Court Award No 542

of 1995 diikut. Oleh kerana responden mengambil pandangan kumulatif terhadap salahlaku-salahlaku permohon yang lepas dalam memutuskan untuk memecatnya, doktrin pemaafan adalah tidak boleh dipakai (lihat ms 66B); *Len Omnibus Co Ltd v Transport Workers Union* [1991] 1 ILR 484 diikut.

(3) Satu pengataan pemangsaan adalah berbeza dan spesifik dalam sifatnya dan ia tidak boleh termasuk dalam satu pengataan amalan buruh yang tidak adil yang am. Ia adalah satu tegasan yang sangat serius dan penting yang perlu diplidkan secara spesifik. Mahkamah Perusahaan adalah betul dalam tidak mengambil kira isu tersebut oleh kerana ia telah tidak diplidkan secara spesifik (lihat ms 66F–G).

Obiter:

Prosiding di hadapan Mahkamah Tinggi dalam kes ini bukan merupakan satu rayuan terhadap satu keputusan Mahkamah Perusahaan tetapi satu kajian semula berkenaan dengan cara keputusan tersebut dibuat. Mahkamah Tinggi adalah tidak berhak untuk mempertimbangkan sama ada keputusan itu dengan sendirinya, di atas merit faktanya, adalah adil dan munasabah. Bukan merupakan fungsi Mahkamah Tinggi di dalam perlaksanaan bidang kuasa penyeliaan untuk mendengar satu pertikaian secara de novo (lihat ms 66G–I).]

Notes

For cases on termination of service, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 836–868.

For a case on matters to be pleaded, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 3574.

Cases referred to

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)

Len Omnibus Co Ltd v Transport Workers Union [1991] 1 ILR 484 (folld)

Mui Beach Hotel v National Union of Hotel Bar and Workers [1982] MLLR 125 (folld)

Syarikat Kenderaan Melayu Kelantan Bhd v Rosdi bin Zakaria Industrial Court Award No 542 of 1995 (folld)

K Selladurai (*Ibrahim Moideen Rama & Partners*) for the applicant.

T Thavalingam (*Shearn Delamore & Co*) for the respondent.

Nik Hashim J: This is an application for orders of certiorari and mandamus respecting the Industrial Court's Award No 240 of 1995 dated 7 June 1995, which upheld the applicant's dismissal from the service of the respondent.

The application was heard by me on 26 October 1998. After hearing the submissions of both sides, I dismissed the application with costs.

The applicant commenced employment with the respondent society on 12 August 1974, as a clerical officer. Sometime in February 1993, honorary secretary of the respondent society received a letter of complaint from the office manager of an alleged act of insubordination by the applicant towards him. Vide a letter dated 12 February 1993, the applicant was asked to explain the allegation of insubordination on her part. The applicant denied the above allegation vide her letter dated 15 February 1993. Dissatisfied with the applicant's response, the respondent held an inquiry on 19 February 1993 and 10 March 1993. The panel found the applicant guilty of the charge which reads:

> It has been reported that on 11 February 1993 between the hours of 3.00 pm and 4.00 pm at the Jaffnese Co-operative Society Ltd's office, No 40–40–1 Jalan Tun Sambanthan 3, 50708 Kuala Lumpur, you blatantly refused to carry out the lawful order of the office manager, Mr V Selvaratnam in that when you were instructed to extend a copy of the Angkasa advice letter to the member, Miss T Thavachelvi (Mem No 16380), you failed to do so.

In consequence of the finding of guilt by the panel of inquiry and taking into consideration the past record of the applicant, namely the numerous warnings that had been issued to her over the years regarding her attitude and behaviour, the respondent terminated her services with effect from 21 March 1993.

The learned chairman of the Industrial Court upheld the dismissal and at p 8 of the award he said:

> The salient facts in this case are not in dispute. The issue before the court is the disobedience by the claimant (applicant) of the instruction of her superior and whether it amounts to misconduct to justify the punishment of dismissal. In considering whether the claimant's (applicant's) conduct in the circumstances of the case amounted to a deliberate disregard of her position as a subordinate it is necessary to examine the nature of the order. There is nothing unlawful or unreasonable for the office manager to instruct her to extend a copy of the letter to a member of the Society even if it is contrary to existing practice. It is not an instruction in conflict with an important policy of the Society. It is a mere administrative matter which the claimant (applicant) was obliged to obey and should not undermine the supervisory position of her superior officer. It is not an accepted norm and it would be impracticable whenever a subordinate is required to perform a simple administrative function it should be put in writing. The claimant's (applicant's) conduct on 11 February 1993 when she blatantly refused to carry out the instruction of her superior was tantamount to defiance of a person in authority and was detrimental to discipline. ... The claimant's (applicant's) insubordination towards the office manager was a breach of duty owed by her to the Society under the contract of employment. It was serious taken together with her past record on her pattern of behaviour. She has little respect for others.
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> I have carefully scrutinised the claimant's (applicant's) record on past misconduct and have found the past incidents were close enough in relations to the misconduct in this instant case. I have taken into consideration her past misconducts for the cumulative effect only for the purpose of deciding the

appropriate punishment as I am of the view they were relevant to the issue before this court. I am fully aware when a misconduct has been condoned or dealt as in this case and the claimant (applicant) retained in service, it is not open to the Society to subsequently dismiss her for the misconduct. But I am of the view if an employee commits the same misconduct, close enough in relation, it is justifiable for the employer to take into consideration past misconducts in determining the proper punishment for the subsequent misconduct.

For the above reasons it is the finding of this court that the claimant's (applicant's) refusal to obey instruction is a serious misconduct. Such misconduct, taken together with her past misconducts justifies the severe punishment of dismissal.

The dismissal of the claimant (applicant) is upheld.

Before me, learned counsel for the applicant argued that the Industrial Court had taken into consideration irrelevant matters in that, he considered the past misconduct of the applicant which occurred about 12 years, last being sometime in 1981, prior to the incident in question. Therefore, it was not justifiable for the employer to take into consideration past misconducts in determining the proper punishment for the subsequent misconduct. Counsel submitted that failure of the learned chairman directing his mind of the interval from the last disciplinary offence in 1981 and the present one, had caused a miscarriage of justice.

In my judgment, past misconduct is a relevant factor to be taken into consideration. If there is a repetition of similar acts of misconduct, the cumulative effect may justify dismissal (see *Syarikat Kenderaan Melayu Kelantan Bhd v Rosdi bin Zakaria* (Industrial Court Award No 542 of 1995). The records (exh KL3, at pp 3, 4, 9) showed that the applicant had been issued with warning letters previously over her conducts and the last one was on 7 July 1981 (Exh KL3 at p 16) being in the form of final warning which reads:

7 July 1981

Puan K Rajaratnam
No 16 Jalan 14/10
Petaling Jaya

Puan,

Re: Disciplinary Action

The Board, having considered your explanation at the Enquiry held on Friday, 3 July 1981, is satisfied that you are guilty of misconduct and breach of office discipline. Taking into consideration our previous written warning to you regarding your conduct and behaviour in the office, the Board has decided to defer your increment for a period of one year.

Please take note that the Board takes a serious view of your behaviour and in future such attitude and behaviour on your part will not be tolerated, and *the Board will not hesitate to take more serious disciplinary action, which may amount to dismissal from service. Please treat this as a final warning.* (Emphasis added.)

...

Yang benar
(V Thangarajah)
President

The message to the applicant was very clear indeed that the warning was a final one. Unfortunately, the applicant did not heed it. The previous warnings could not be considered as 'spent', even though the final warning was issued some 12 years prior to the incident. Since the final warning was breached by the applicant's misconduct, the respondent society could not be expected to overlook the past bad record of the applicant and to confine itself to the particular incident of this case (see *Mui Beach Hotel v National Union of Hotel Bar and Workers*[1982] MLLR 125). In the present case, the doctrine of condonation was not available to the applicant as the respondent society was taking a cumulative view of her prior misconducts in deciding to dismiss her (see *Len Omnibus Co Ltd v Transport Workers Union* [1991] 1 ILR 484). Thus, the learned Chairman of the Industrial Court was right to take the past misconduct as a relevant consideration for the purpose of determining the appropriate punishment for the subsequent misconduct.

The applicant's counsel also contended that the applicant's conduct was not an act of insubordination and that the order of dismissal was a harsh punishment. I did not agree with him. The Industrial Court had made the findings of fact that the applicant had committed a misconduct and that after scrutinizing her past record, was satisfied that the respondent society was justified in terminating her services. Whether the punishment was harsh or not was not for this court to consider. It was a matter for the Industrial Court. On the evidence, I held that the decision of the Industrial Court was correct.

Lastly, the applicant complained that the Industrial Court refused to consider her evidence with regards to her claim of victimization due to the involvement of her brother-in-law concerning election to be a Board Member of the respondent society on the ground that victimization was not pleaded in the statement of case.

In this respect, I agreed with respondent's counsel's submission that victimization was a very serious and important averment which needed to be pleaded specifically. Since the allegation was distinct and specific in nature, I held that the issue of victimization was not covered by a general allegation of unfair labour practice as was pleaded. It had to be pleaded clearly. This the applicant did not do. The respondent society could not be expected to guess through the pleadings what victimization was all about. It is trite law that a party is bound by its pleadings. Thus, the Industrial Court was right to disregard this so-called issue of victimization in the award.

It is worthy to note, lest we forget, that the proceedings before this court is not an appeal from a decision of the Industrial Court but a review in the manner in which the decision was made. The High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merit of the facts, was fair and reasonable. The Industrial Court in this case had heard the evidence from both sides and it came to a decision that the applicant's misconduct justified her dismissal from the respondent society's services. In my view, the decision was justified and correct in law. It is not the function of the High Court in the exercise of its supervisory jurisdiction to hear a dispute de novo and decide it on its merits. This is not

A a case where the Industrial Court has acted on no evidence or had come to a conclusion which on the evidence it could not reasonably come to (see *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417). The Industrial Court had not committed any error of law in making the impugned award. The court had not exceeded its jurisdiction. It had not taken irrelevant factors into consideration. Neither B did it fail to consider material and relevant factors. There was no miscarriage of justice in this case.

Therefore, I made the order accordingly.

Application dismissed

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Reported by Tan Kah Bee

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